Brick & Tile Sales Company, whose name had prior to December 1952 been Altoona Clay Products Company, Inc. (Ext. 44, R. 147), had given a $60,000.00 mortgage bond on June 28, 1954 (Ext. 9, R. 109), three years before Respondent Altoona was incorporated. On November 10, 1961, judgment was confessed on this bond, according to documents on record in the Blair County Prothonotary's office (Ext. 12, R. 114). The mortgage had been entered of record in Blair County in June 1954 (Ext. 8, R. 101). Petitioner had issued a report on Brick & Tile Sales Co. notifying its subscribers of the judgment in December 1961 (Ext. 13, R. 115).

In June 1962, Petitioner had issued a credit report on Altoona in which it made no reference to the Brick & Tile Sales judgment (Ext. 20, R. 124). When Petitioner's representative made his check of court records in Blair County in January 1963, he took this previous report with him. It disclosed that Altoona was incorporated in 1957. The representative conducted a careless and slipshod investigation of court records. He checked only the judgment index and made no examination of the judgment docket, the records of the confession of judgment, the original instruments or the mortgage, all of which were available to him at the courthouse (R. 1276, 1277). The least examination of these dockets would have revealed that the $60,000.00 judgment was not against the Respondent Altoona.

The petitioner corporation was well acquainted with Altoona and its correct corporate name. Altoona had been one of its subscribers (R. 411) and Petitioner had, in fact, been engaged by Altoona to undertake collection of delinquent accounts (R. 647).

The jury returned a verdict in favor of Altoona for general damages in the sum of $110,000.00. The Court of Appeals ordered the entry of judgment upon this verdict (A. 93).

Argument

Petitioner has no basis for asking this Court to grant certiorari in order to review the decision of the Court of Appeals.

Although Petitioner has litigated this case for eight years, and there have been two reported decisions from the Court of Appeals and four from the District Court, and although Petitioner assigned thirty-three reasons and subreasons in support of its request for reargument in the Court of Appeals, in early 1971, it has never raised the argument, which it now advances, that the jury's award of general, and not special, damages deprived it of constitutional rights under the First and Fourteenth Amendments.

On the eve of the third trial, the District Court, acting *sua sponta*, ruled that the case of *New York Times v. Sullivan*, 376 U. S. 254; 84 Supreme Ct. 710 (1964), and cases decided thereunder, barred Respondents from recovering compensation in this libel case for damages which they sustained. The District Court erroneously ruled that the false credit report was a matter of public interest under *Rosenbloom v. Metromedia*, 415 F. 2d 892 (1969), and that Respondent's case failed because it had not proved that the report had been issued with malice.

The Court of Appeals pointed out that this credit report was issued by Petitioner in the course of its business, which was to distribute factual information to its limited group

of subscribers; that the report was issued in strict confidence; and that the subscriber who received it was not to disclose the contents either to the subject of the report or to anyone else. The Court ruled that neither the New York Times decision nor the Metromedia case were applicable.

The Petitioner apparently agrees with this decision of the Circuit Court, for it does not assert in its petition for certiorari that the New York Times rule is applicable or that Respondents were required to prove malice in order to recover damages.

Petitioner can not and does not urge that the decision of the Third Circuit is in conflict with the decision of any other court of appeals or with the decision of this Court. The issue now raised for the first time in the petition for certiorari was never advanced by Petitioner prior to this time.

The Court's Recent Decision in Rosenbloom v. Metromedia, Inc.

To support its argument that the rights of Petitioner under the First and Fourteenth Amendments were violated by the jury's award of general damages, the Petitioner allegedly relies on several opinions rendered by members of this Court in *Rosenbloom v. Metromedia*, 91 S. Ct. 1811 (1971).

Respondents submit that the issues determined in the Rosenbloom case do not remotely resemble the question which the Petitioner constructs in its petition.

Several preliminary facts are as follows:

1. The element of punitive damages is not involved in the present case. The trial court refused to admit any evidence on this claim or to submit it to the jury (A. 40).

2. The jury awarded the Respondents compensatory damages. The verdict was for 'general' and not for 'special' damages, although the evidence supporting the two elements was, according to the trial judge, substantially the same (A. 38). No complaint could be made that the award contained a duplication of damages.

3. In the Rosenbloom case an award was made for $25,000.00 in 'general' damages and $750,000.00 for punitive damages.

Petitioner states that a majority of the members of this Court expressed the view that the First Amendment precludes recovery in a libel case unless there is proof of special damages (Brief p. 12). A reading of the several opinions in Rosenbloom leaves Respondents without a clue as to the basis for Petitioner's statement.

Mr. Justice Brennan, speaking for three members of this Court, held that the rule in *New York Times v. Sullivan*, 376 U. S. 254 (1964), 84 Supreme Court 710, precludes a recovery in libel actions—absent malice—where the claim is based on news publications wherein the matter is of general or public interest, as well as in cases involving public officials and public figures.

As stated above, Petitioner is not pressing the argument that the New York Times rule has any application to the present case.

It is significant that Mr. Justice Brennan attached two pertinent footnotes in his Opinion—(1) that the Court is not intimating a view on the extent of constitutional pro-

tection of any purely commercial communication made in the course of business (n. 12, p. 1820) and (2) that the Court has not yet considered the impact of the First Amendment on the application of state laws to libels, wherein there is no issue of general or public interest (n. 17, p. 1822). In the present case, the defamatory publication was a purely commercial communication and the Court of Appeals ruled that there was no issue of general or public interest involved (A. 82).

The concurring opinions of Justices Black and White made no reference whatsoever to damage awards as factors in their dissents.

In Mr. Justice Harlan's dissent, he urged that in dealing with private libel the state should be permitted to set the applicable standard of care for publishers and that punitive damages should be recoverable by the victim of a wrongful publication if those damages bear reasonable relation to the compensatory damages awarded for actual harm to the plaintiff.

Justices Marshall and Stewart dissented, in the only opinion which made even indirect reference to the issue which Petitioner seeks to raise. They would impose no limitation on the recovery of actual damages, but would restrain 'punitive' and 'presumed' damages. Appropriate to the award in this case, their dissenting opinion states:

> "Of course, damages can be awarded for more than direct pecuniary loss but they must be related to some proven harm." (p. 1840)

General Damages

General damages are not punitive in nature but are compensatory. This had not been questioned by Petitioner during the years of litigation in this case until the filing of this petition for certiorari. The *Restatement of the Law of Torts*, Sec. 621, Comment (a), expresses this:

> "General damages are a form of compensatory damages. They are imposed for the purpose of compensating the plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have cause to his reputation."

See the District Court's instruction to the jury (A. 98).

At this time, Dun & Bradstreet does not deny that Respondents have a claim for damages against it for the false and defamatory credit report which it circulated among Respondents' suppliers. There is a long line of authorities supporting the right of such an injured person to recover general damages.

Montgomery v. Dennison, 363 Pa. 255 (1949);
Hartman Co. v. Hyman and Lieberman, 87 Pa. Super. 358 (1926), affirmed by the Pa. Supreme Ct. at 287 Pa. 78 (1926);
McIntyre v. Weinert, 195 Pa. 52 (1900);
Will (Trading as National News Co.) v. Press Publishing Co., 309 Pa. 539 (1932);
Hayes v. The Press Co., Ltd., 127 Pa. 642 (1889);
Maytag Co. v. Meadows Mfg. Co. (7 C. C. A.) 45 F. 2d 299 (1930);
Aetna Life Ins. Co. v. Mutual Benefit Health & Accident Ass'n (8 C. C. A.) 82 F. 2d 115 (1936).

See also: *Pennsylvania Statute of April 11, 1901*, P. L. 74, Sec. 3, 12 P. S. 1583.

Very pertinent to the damage award to injured Respondents in the present case is the rule which has been enunciated repeatedly by this Court that if a defendant's wrongful conduct has caused plaintiff damages which are difficult of exact determination, the plaintiff will not be required to prove his loss with exactness and precision. To hold otherwise, this Court said in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931), 51 S. Ct. 248, 250, would relieve the wrongdoer from damages "and throw the loss upon the injured party, (and) would be little less than legalized robbery."

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359; 47 Supreme Ct. 400;
Sheldon v. Metro-Goldwyn Pictures Corp., 304 U. S. 390; 60 Supreme Ct. 681.

For these reasons, Respondents respectfully urge this Court to refuse Dun & Bradstreet's petition for certiorari.

Respectfully submitted,

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